IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 213 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

COMMISSIONER OF INCOME-TAX - Applicant(s)

Versus

NUTHERN PVT LTD - Respondent(s)

==========

Appearance :
MR BB NAIK for Applicant
NOTICE SERVED for Respondent(s) : 1,
==========

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 20/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench “B” has referred the following question under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax.

> “Whether on the facts and circumstances of the case, the Tribunal is right in relying upon sub-section (4) of Section 3 of the Act as it stood prior to the amendment with effect from 1-4-1989 thereby cancelling the order of C.I.T. U/s 263?”

2. The assessment year is 1985-86. The assessee's accounting period is 1-7-1983 to 30-6-1984 and the assessee was assessed under Section 143(3) of the Act by order dated 4-1-1988.

3. On 31-12-1984, the assessee company amalgamated with M/s Nestler Boilers Pvt. Ltd. Therefore, the accounts of the assessee company were made up for a period of six months from 1-7-1984 to 31-12-1984 showing net profit of Rs.2,86,074/-. The assessee company accordingly filed the return of income for assessment

year 1986-87. Assessment came to be framed for assessment year 1986-87 on total income of Rs.3,83,170/- for the six months' period.

4. The Commissioner of Income Tax, Baroda (the CIT) initiated action under section 263 of the Act for assessment year 1985-86, as according to him, the income of Rs.3,83,170/- for the accounting period of six months from 1st July 1984 to 31st December 1984 had to be assessed as income for assessment year 1985-86 and not assessment year 1986-87. According to the CIT, since the six months' period ending on 31st December 1984 fell during financial year 1984-85, the income was assessable for assessment year 1985-86 and therefore, the assessment order dated 4-1-1988 for assessment year 1985-86 was erroneous and prejudicial to the interest of revenue. He, therefore, set aside the assessment for assessment year 1985-86 with a direction to pass a fresh assessment order so as to assess the income of a period of eighteen months from 1st July 1983 to 31st December 1984.

5. The assessee carried the matter in appeal before the Tribunal. Vide order dated 17-11-1993, the Tribunal

held that the order of Commissioner under Section 263 of the Act was not legally tenable and accordingly, it cancelled the said order. For this purpose, the Tribunal placed reliance on the provisions of Section 3, with special reference to sub-section (4) of the said section, of the Act, as it stood prior to the amendment with effect from 1-4-1989.

6. Heard Mr.B.B.Naik, the learned standing counsel appearing on behalf of the applicant revenue. Though served, there is no appearance on behalf of the assessee.

7. Section 3(1) of the Act defines “previous year” and under clause (a), it means the financial year immediately preceding the assessment year; under clause (b), it is laid down that if the accounts of the assessee have been made upto a date within the said financial year, then, at the option of the assessee, the 12 months ending on such date; under clause [c], the Central Board of Direct Taxes or any authority authorized by the Board may determine such period in case of any person or class of persons, or business or class of business which do not fall either under clause

(a) or clause (b); and under clause (d), in case of a business or profession, which is newly set up during a financial year, the assessee has an option to make up the accounts commencing from the date of setting up of the business to any date within the financial year. For the present, it is not necessary to refer to other clauses of sub-section (1) of section 3 of the Act, nor sub-sections (2) and (3) of section 3 of the Act. However, sub-section (4) of section 3 of the Act, on which reliance has been placed by the Tribunal, may be considered. The same reads as under (as it stood at the relevant point of time):

> "Where in respect of a particular source of income or in respect of a business or profession newly set up, an assessee has once exercised the option under clause (b) or sub-clause (ii) of clause (d) or sub-clause (i) of clause (e) of sub-section (1) or has once been assessed, then, he shall not, in respect of that source, or, as the case may be, business or profession, be entitled to vary the meaning of the

> expression “previous year” as then applicable to him, except with the consent of the Income Tax Officer and upon such conditions as the Income Tax Officer may think fit to impose.”

Sub-section (4) provides that, in case of an assessee, who has once exercised the option, either under clause (b) or other clauses of sub-section (1) or has once been assessed in respect of a particular source of income or in respect of a business newly set up, such assessee shall not be entitled to vary the meaning of “previous year” for the purpose of said source of income or the business, except with the consent of the assessing officer and subject to such conditions that the officer may think fit to impose. Therefore, in the present case, the assessee having exercised the option once of adopting the “previous year” as commencing on 1st July every year and ending on 30th June of next year i.e. comprising a period of twelve months, the assessee had no option but to consistently follow the same. It is not the case of the CIT that the assessee has violated the same.

8. As the facts go to show, the assessee ceased to exist on and from 31st December 1984 on account of amalgamation with M/s Nestler Boilers Pvt. Ltd. and hence, for assessment year 1986-87, it had to make up its accounts for the period of six months commencing from 1st July 1984 and ending on 31st December 1984 for the simple reason that thereafter the company had ceased to exist. The fact of existence of the company coming to an end is not in dispute.

9. As can be seen from sub-section (1) of Section 3 of the Act, the definition of “previous year” shows that, in normal circumstances, a “previous year” is comprised of a period of 12 months and not more. For assessment year 1985-86, the previous year was a period of 12 months and the assessment had been framed accordingly. The CIT has not brought any material on record to show as to what error had been committed by the assessing officer; and even if it is assumed that there was an error, as to how such error was prejudicial to the interest of revenue. In fact, none of the twin conditions are shown to have been satisfied by the CIT while passing the impugned order under Section 263 of the Act. The Tribunal was, therefore, right in holding

that, in absence of any error and any prejudice to the interest of revenue having been shown by the CIT, he could not have assumed jurisdiction under Section 263 of the Act. In fact, the CIT has failed to point out any provision by which he could in exercise of powers under Section 263 of the Act change the previous year. What was not open to the assessee could not be available to revenue.

10. There is one more aspect of the matter. As can be seen from the facts on record, the very same income, namely, Rs.3,83,170/- was already assessed for assessment year 1986-87. Without the said assessment being disturbed, the very same income could not have been once again sought to be taxed in assessment year 1985-86. This issue was raised on behalf of the assessee before the Tribunal, but except for recording the same, the Tribunal has not rendered its finding, but the same has not been disputed on behalf of the revenue before the Tribunal.

11. Hence, the impugned order of Tribunal does not suffer from any legal infirmity so as to warrant interference. The Tribunal was justified in holding that, by virtue

of provisions of section 3(4) of the Act, as it stood prior to the amendment with effect from 1-4-1989, the Commissioner had committed an error in exercising jurisdiction under section 263 of the Act and the order under section 263 of the Act was rightly cancelled. The question is accordingly answered in the affirmative i.e. in favour of the assessee and against the revenue.

12. The reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

parmar*